APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 93-1431

JO ANN PLAKAS, Individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, Deceased,

Plaintiff-Appellant,

v.

JEFFREY DRINSKI, in both his individual and official capacity and NEWTON COUNTY, INDIANA, a municipal unit of government,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 91 C 365—**Rudy Lozano,** *Judge.*

ARGUED NOVEMBER 1, 1993—DECIDED MARCH 21, 1994

Before CUMMINGS and COFFEY, *Circuit Judges,* and ZAGEL, *District Judge.**

ZAGEL, *District Judge.* Konstantino Plakas was shot once and killed by Jeffrey Drinski, a deputy sheriff. The

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* The Honorable James B. Zagel, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

only witnesses to the shooting were three police officers, Drinski and two others. All of the witnesses testified to an act of self-defense; that Plakas was moving toward Drinski and menacing him with a fireplace poker and that, moments before, Plakas had said to Drinski, "Either you're going to die here or I'm going to die here." Plakas's administrator claimed that the self-defense story was full of holes and that, even if it were not, Drinski and the county which employed him had a constitutional obligation to do more to preserve his life than they did. The district judge disagreed and granted summary judgment. This appeal followed.

The details matter here, so we recite them.

When the police first saw Plakas, at about 9:30 p.m. on February 2, 1991, he was walking along State Road 10 in Newton County, Indiana, not far from the Illinois state line. His car had run off the road and wound up in a deep water-filled ditch. Sergeant Buddy R. King, of the Newton County Sheriff's Department thought the car had rolled over on its top and slid for 150 to 200 feet before rolling upright, striking a tree and coming to rest in the ditch. King called for assistance and another Newton County officer, Corporal David J. Koby, and two paramedics, Glen Cain and Steven Whitt, responded. On the way to the scene of the accident, Cain noticed Plakas walking along State Road 10. Cain approached Plakas and saw that Plakas's clothing was wet from the waist down. Cain stopped and spoke to Plakas who said he was fine except that he was cold. Cain examined Plakas's head and found nothing that required medical treatment. Plakas told Cain he had been the driver of the car in the ditch, and Plakas agreed to get into Cain's car in order to be driven back to the accident scene, now about a mile from where Plakas was found. Cain knew there was an ambulance at that site and that Plakas could be examined more carefully there. Cain smelled alcohol on Plakas's breath and Plakas dozed off as they rode to the place where the car had gone off the road.

When Cain and Plakas arrived, the ambulance driver examined Plakas. Cain told Corporal Koby to check Plakas for intoxication and he told Koby why. Plakas refused medical treatment and signed a written waiver of treatment. Koby spoke to Plakas who had some difficulty communicating the fact that he did not have his driver's license (which he had surrendered as bond for a traffic ticket he received in Illinois). Plakas did agree to go to the Sheriff's Department to be tested for intoxication. Koby frisked Plakas and then handcuffed him, with his hands behind his back.

Plakas complained about being cuffed behind his back. He told Koby that this hurt him because he had burn scars on his chest and thought that if he got in the car, his chest would start to bleed. Koby told Plakas that this manner of cuffing was department policy which he must follow. Koby also thought that he would have a problem with Plakas if he uncuffed him. Koby opened the rear door of his squad car, and Plakas entered the car voluntarily. In Koby's car, the rear door handles are not removed. After a brief interval, Koby got in the car and drove away. As he drove he heard a noise that suggested the rear door was opened. He hit the brakes and heard Plakas hit the screen between the front and rear seats. Then the rear door flew open, and Plakas fled into snow-covered woods.

Koby reported the escape and called for help. King, Koby, Cain and Trooper Lucien Mark Perras of the Indiana State Police responded, as did Deputy Sheriff Jeffrey Drinski.

Plakas ran to the Ailes home located on a private road north of State Road 10. He knew the Aileses, Roy and Joyce; he was engaged to marry their daughter, Rachel. They called Plakas "Dino." Joyce Ailes heard Dino banging against the house; she saw him and opened the door. He fell on his face inside the doorway, his hands still cuffed behind his back. Joyce and Rachel helped him. They noticed that his clothes were wet. Plakas told them

that he had wrecked his car and that his head hurt. Joyce saw no blood, but saw bumps on his head and bruises. He appeared to be blacking out.

Roy Ailes spoke to Plakas, smelled alcohol on his breath, and found him to be upset and insistent that he did nothing wrong. Roy told him that he should not run from the police. Plakas agreed that Roy should talk to the police. Roy went out and found Cain, whom he knew, and reported that Plakas was at the Ailes home and willing to come out. Cain and some officers went to the house. Roy stayed outside to direct other police to his house.

Cain and Koby were the first to enter. Cain saw Plakas push his legs through the circle of his arms, bringing his cuffed hands to the front of his body. Plakas was calm until he saw Cain and Koby. While Cain and the others tried to explain that Cain was from the fire department and wanted only to give medical aid, Plakas was loud and combative; (Joyce Ailes said he was "hysterical"). Plakas accused Koby of hurting him, and yelled about the handcuffing behind his back and about his scar tissue. He swore Koby would not touch him. Koby sought to reassure Plakas that he was not there to hurt him. Koby gestured for Cain to back up.

Plakas backed into a corner and neared a set of fireplace tools. He picked one of them up, a 2-3 foot poker with a hook on its end. Then gripping it with both hands, he continued screaming, louder and louder at Cain and Koby. Finally he rushed at Koby and swung quite hard at Koby, striking Koby's wrist with the poker. Koby moved away and tried to come in the room from another door, but Plakas chased him away, swinging the poker. Deputy Drinski passed by the injured Koby and asked him with what he was hit; Koby told him that Plakas had a poker. Inside the house, Plakas took the poker, slammed it into

the wall[1] and then beat his head against the wall. Cain left.

Having driven Koby and Cain from the house, Plakas walked out of the front door. Drinski and Perras had entered the house from the garage and saw Plakas leave. They followed him out, now with guns drawn. Roy Ailes, who had just returned to his house, saw the officers with guns drawn and ran forward saying, "Don't shoot, I'll talk to him." Roy tried to talk Plakas into surrendering. As he did so, Plakas slowly backed down a hill in the yard. The officers told Plakas to drop the poker. At one point, Plakas lowered the poker but did not lay it down. He raised or cocked the poker but did not swing it. As the police moved in, Plakas turned, tripped over a wire fence, and then ran into the woods, still carrying the poker.

The police gave chase, shouting, "Stop, Police." The moon was bright, light was reflecting off the snow and it was easy to track Plakas who slowed as he entered a row of thick brush hedges. Through an opening in the brush was a clearing. Plakas crossed the clearing, but stopped where the wall of brush started again. Perras and Drinski entered the clearing. Sergeant King stood just outside it. Plakas turned and faced them. The clearing was small, but Plakas and the officers were ten feet apart. Drinski blocked the opening in the brush where all had entered the clearing.

For the next quarter-hour or half-hour, Drinski and Perras tried to talk Plakas into surrendering. At times Plakas moved the poker about; at times it rested against the ground. Drinski did most of the talking. His theme was that there were people, including his girlfriend at the house, who cared about Plakas and that nobody needs to get hurt. He also told Plakas to drop the weapon and get

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[1] We adopt the version most favorable to plaintiff. Cain said that Plakas was not slamming the poker into the wall, rather, he was starting toward Cain and perhaps swinging it at Cain and missing. Cain thought Plakas was out to kill him.

down on the ground. They talked about the handcuffs and the chest scars. Plakas opened his shirt to show the scars to Drinski. King, listening from outside the clearing, thought Drinski might persuade Plakas to drop the weapon, but he did not. Drinski did not believe that Plakas was ever ready to surrender, although he was calmer for a time.

At one point Plakas pointed the poker at Drinski and said, "Either you're going to die here or I'm going to die here." He also said, in substance, "Go ahead and shoot. My life isn't worth anything." Plakas often repeated these thoughts. Then Plakas tried to break through the brush. He turned back to Drinski who was 12 to 15 feet away and, with the poker raised, charged at Drinski who backed away. Drinski's retreat was involuntarily stopped, either by his backing into a tree or by a near stumble of some sort. Drinski believed he couldn't retreat because there was something behind him. He saw Plakas cock the poker over his head for a swing and, when Plakas was two arms lengths away, he fired once at Plakas' chest. The shot hit Plakas in the chest inflicting a mortal wound. After he was shot, Plakas fell to Drinski's right and lay face down semiconscious on the ground. Perras took the poker. Plakas was turned on his back. The handcuffs were removed. Plakas remained semiconscious until medical assistance arrived. He moaned and said, "I'm dying." Since medical assistance previously had been requested for Koby, it was not long in coming. When paramedic Whitt arrived at the clearing, he found Plakas laying about a foot from the brush at one corner of the clearing. Plakas died sometime after he arrived at the hospital.

Drinski was in fear of his life, and Plakas's action was sudden and unexpected. Perras would have shot Plakas if Drinski had not. During the entire time in the clearing, Perras had a canister of CS repellant on his belt.[2] It could

[2] Perras said that he did not use the CS repellant because he was too far from Plakas and because it might have landed on his fellow officers. Whatever the facts may be, it is hard to attribute to either Drinski or Newton County the inaction of Perras, who is neither a defendant here nor under the command of Newton County.

have been used to disable Plakas. Moreover, about ten minutes before the shooting, the services of a canine unit (from Lake County) were offered. The police could have tried to put barriers between themselves and Plakas and maintain distance from him.

This is not a case where an officer claims to have used deadly force to prevent an escape. It is a self-defense case where the officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer" and, therefore, the officer may use deadly force. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). *See also Graham v. Connor*, 490 U.S. 386, 396 (1989). Indeed, had Drinski been a private citizen, he would have been entitled to claim self-defense under Indiana law (which does not have a rule of retreat). *French v. State*, 403 N.E.2d 821, 823, 825 (Ind. 1980); *Montague v. State*, 360 N.E.2d 181, 188-89 (Ind. 1977).

Drinski was faced with a man who had, minutes before, attacked a police officer with a dangerous weapon, had refused several entreaties to disarm, had told the officer that one of the two would die that night, and then had moved toward the officer while raising his weapon to strike. Shooting a man who has told you, in effect, that he is going to use deadly force against you and then moves toward you as if to do so is unquestionably an act of self-defense even if, as Plakas's expert maintains, the man is attempting "suicide by police."

Plakas argues there is enough evidence to cast doubt on the defendants' self-defense claim, given the low threshold that courts have set for refuting self-defense in deadly force cases both civil and criminal. The award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify. In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach. So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements

and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial.

This guiding principle does not fit well here. There is a witness who corroborates the defendant officer's version. And there is no reason to discount the testimony of Trooper Perras; he is neither a defendant himself nor employed by the defendant Newton County. Even if there were no other witness, there is virtually nothing in this record to impeach Drinski. Plakas brings up a few bits of evidence to do so. First, according to Drinski, Plakas charged away from the brush at Drinski, yet one paramedic who was summoned to the clearing to administer to Plakas observed that Plakas's feet were about a foot from the brush. This does not help Plakas's case because, by the time the paramedic arrived, Plakas's body had been moved, rolled over by Drinski and Perras.[3] Plakas himself may have also moved; the dying man kicked over the paramedic's medical case.

Second, Drinski said he was stopped in his retreat by a tree. Perras only saw that Drinski stumbled in his retreat either because he backed into something or simply tripped. The fact remains that both officers say that Drinski's retreat occurred and that it ended by virtue of some circumstance other than Drinski's volition. Further, says Plakas, a photograph of the clearing shows there was no

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[3] The record before us leaves only room for speculation about some circumstances. We do not know whether there was any forensic investigation made at the scene. We know the caliber of the bullet, but not its type or weight or the power of the charge in the cartridge, nor do we know where it struck Plakas and what effect it might have on the position of the body. *See* Martin L. Fackler, M.D., *Police Handgun Ammunition Selection*, WOUND BALLISTICS REVIEW, Fall 1992, at 32-37 (suggesting little effect beyond stopping movement). Because these facts are not in the record, we cannot consider them on appeal and assume that had they any significance, they would have been made part of the record. Circuit Rule 28(d); *Branion v. Gramly*, 855 F.2d 1256, 1260-61 (7th Cir. 1988).

tree there to stop Drinski, just a sapling, and there are no footprints corroborating Drinski's story of retreat. Actually, the photograph is not included in the record here. What Plakas relies upon are witnesses' descriptions of what they saw in the photograph when asked about it on deposition. There is no showing that any footprints could be clearly discerned in the photograph. In any event, Drinski did not say he was stopped by running into a tree, he said it felt as though he ran into a tree and there is nothing in the record to contradict this testimony other than counsel's speculation that an officer who backs into a sapling would not reasonably believe a tree was at his back. The tree-sapling discrepancy is of the sort on which popular conspiracy theories are built, but it is not enough to allow a rational trier of fact to decide against Drinski. *See Perfetti v. First Nat'l Bank of Chicago*, 950 F.2d 449, 456 (7th Cir. 1991); *Tom v. Voida*, 963 F.2d 952, 961 (7th Cir. 1992).

Perhaps in recognition of this weakness in the case, Plakas offers two other theories, one of which is a minor theme of his brief, that shooting in self-defense is unjustified where the aggressor acted out of reasonable fear of police brutality. *See Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (*en banc*). Perhaps we ought not to consider this theory since it was not pled, but it is of no use to Plakas in any event.

This theory is founded on the fact that Plakas told Koby, "You hurt me," and on Joyce Ailes's observation that Plakas had facial injuries. From this, Plakas argues a jury could infer that Officer Koby had beaten Plakas. This inference, however, cannot reasonably be made. Leaving aside the absence of evidence of facial injuries from medical records or post-mortem observation, we accept that Mrs. Ailes saw these injuries. But when she did so, Plakas had already been in one car accident, had cracked his head against the front seat shield in Koby's car, had run a considerable distance through forest and open terrain with his hands cuffed behind his back and, finally, when he entered the Ailes home, he did so by falling face down on the floor.

Moreover, when Plakas did say anything at all about Koby, it was a complaint about cuffing him behind his back, which he said (without medical corroboration even now) caused pain because of his scar tissue. Plakas yelled a lot at Koby. It is significant he never yelled about a beating.

Even if Koby did beat Plakas, Koby was not at the scene of Plakas's demise. The officers who confronted Plakas were not the officers who injured him and should be able to claim self-defense. The proposition that an officer who beats John Doe may not use self-defense to justify killing Doe, who later attacks him, rests on the idea that because the officer's wrongful acts caused the attack, he cannot take advantage of his fear of retaliation to defend against liability. *See Gilmere*, 774 F.2d at 1501 ("any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse").[4] Drinski did not cause Plakas to attack him. He can claim self-defense to shooting Plakas.

Finally, there is the argument most strongly urged by Plakas. Even if Plakas attacked Drinski and Drinski acted in self-defense, Plakas was still wronged because Drinski had a duty to use alternative methods short of deadly force to resolve the situation before him. Taken literally the argument fails because Drinski did use alternative methods. He tried for quite a while to get Plakas to lay down the poker and surrender and even attempted to retreat as Plakas charged him. Plakas means to argue that Drinski should have used *all* available alternatives before deadly force was exercised and that Newton County, Drinski's employer, is liable because it failed to equip and train Drinski to use such methods.

The alternatives here were three. The police could have continued to maintain distance from Plakas and keep some form of barrier (like the row of hedges) between him and

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[4] Here we distinguish *Gilmere*, but by doing so we neither approve nor disapprove of its holding.

them. They could have used disabling chemical spray, or they could have used a dog to disarm Plakas. It is unusual to hear a lawyer argue that the police ought to have caused a dog to attack his client, but he is right that such an attack *might* have led to a better result for his client (and would, in our view, have led to a different sort of lawsuit). Plakas also correctly refrains from arguing that the police should have simply walked away and arrested Plakas on another day.

There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.[5] There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first. In *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (*en banc*), police officers shot and wounded a masked bank robber fleeing from the scene of his crime. Twice the police called out, "Halt, police," but the plaintiff may not have heard. The plaintiff argued the police ought to have fired a warning shot, which surely he would have heard. We said, "[T]he officers' split second decision to use their weapons, after twice warning the suspect, was objectively reasonable under the circumstances. We refuse to impose as an additional constitutional requirement the firing of a warning shot before deadly force may be used." *Id.* at 1276, n.8. Also, in *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992), it was claimed that the police had so poorly planned an arrest that the chance of a deadly gunfight was increased rather than minimized. An alternative plan could have reduced or eliminated the possibility of the arrestee's use of a gun. In *Carter*, such an alternative was not merely speculative; the arrestee was employed

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[5] There may be state law rules which require retreat, but these do not impose constitutional duties. *See Reed v. Hoy*, 909 F.2d 324, 330-31 (9th Cir. 1989).

inside a prison where he would not have had a gun on his person. Yet we rejected the proposition "that the Fourth Amendment prohibits creating unreasonably dangerous circumstances in which to effect a legal arrest of a suspect." *Id.* at 1332. These cases make it clear that liability cannot be founded on the failure of Drinski to keep some sort of distance or natural barrier between himself and Plakas.

The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in ordering search and seizure cases. The only test is whether what the police officers actually did was reasonable. *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976). We do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee* and *Graham v. Connor, supra.*

But Plakas does have at least one opinion on which he may build his argument, that is, *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992), a case of tragic dimension where an officer stopped to help a fallen man and eventually, as two courts held, had to kill that man in defense of her own life. In brief, after the officer stopped to help the man, his actions and his flight showed he was unhurt and may well have stolen the bike from which he fell. She chased him and, when she caught him, he attacked her, banging her head into a concrete surface. He fled but she caught him. Again, he struck her. It became clear she could not physically subdue him. She did not have her night stick. She had no idea if other officers would arrive. She decided she would have to pull her weapon so that he would not get it. After the weapon was out, she told him three times, "Please don't make me shoot you." He moved toward her. She fired and missed. He stopped, then lunged again; she fired into his chest. In affirming summary judgment for the officer, we said,

> Voida could not have subdued Tom through lesser means, as she did not have her nightstick with her and she feared that reaching for her chemical repellant would expose her weapon to Tom's grasp. Voida fired one shot at Tom which did not hit him, but he insisted on lunging at her again. Voida was justified in concluding that Tom could not have been subdued except through gunfire.

Id. at 962.

It is obvious that we said Voida thought she had no alternatives. But did we hold that this imposes a constitutional duty to use (or at least consider) the use of all alternatives?

The answer is no. *Tom v. Voida* did not, and did not mean to, announce a new doctrine. Nearly every court has commented on that fact that all decisions about deadly force (or any force) "must embody allowance for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain and rapidly evolving." *Graham*, 490 U.S. at 396-97; *see also Sherrod v. Berry*, 856 F.2d 802, 806-07 (7th Cir. 1988) (*en banc*). We always judge a decision made, as Drinski's was, in an instant or two. It is true we consider the whole of the event as it appears to the officer involved, but we recognize that the decision to shoot can only be made after the briefest reflection, so brief that "reflection" is the wrong word. As Plakas moved toward Drinski, was he supposed to think of an attack dog, of Perras's CS gas, of how fast he could run backwards? Our answer is, and has been, no because there is too little time for the officer to do so and too much opportunity to second-guess that officer.

In *Tom v. Voida* we were not addressing Officer Voida's decision to shoot; we were addressing her decision to draw her firearm and, even there, we spoke of a decision process that was quick and simple. Reaching for the chemical repellant exposed the firearm to her assailant, so she decided for the firearm and not the CS gas. This is not the

kind of weighing of least deadly alternatives that Plakas would have us require of Drinski. What Drinski did here is no different than what Voida did. He tried to avoid violence. Then, when he thought his retreat would not be successful, he was justified in concluding that Plakas could not be subdued at that moment except through gunfire.

Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

So we carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage. *Tom v. Voida* is a classic example of this analysis. Here it is beyond dispute that, under the Constitution, the police could reasonably (1) arrest Plakas for drunk driving after he exhibited familiar signs of intoxication; (2) track down an escaping arrestee; (3) draw and point weapons after Plakas armed himself and attacked an officer; (4) pursue Plakas into the clearing after he committed a violent offense and was a danger to himself; and (5) try to talk Plakas into disarming himself and surrendering. All of this means Drinski was properly standing in the clearing, gun in hand, several feet away from Plakas, who charged him with the poker raised. It is from that point on that we judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer.

Here we agree that the undisputed facts can lead to but one conclusion, that Drinski's use of deadly force was reasonable given Plakas's act of aggression and Drinski's knowledge of what had gone on before.

Since Drinski did not violate Plakas's rights, there usually is no basis for holding his employer, Newton County, liable. *Tom*, 963 F.2d at 962. Yet there exists a possibility that although Drinski's acts were justified given his circumstances, Newton County may be held liable for creating those circumstances. Plakas implicitly argues that although Drinski's choice among available alternatives was reasonable, he should have had more choices, *i.e.*, a trained canine, a canister of gas.[6] Plakas implicitly seeks to hold Newton County liable for not providing those choices.

There is, however, not a single precedent which holds that a governmental unit has a constitutional duty to supply particular forms of equipment to police officers. And, in fact, the Fifth Circuit has held that the Constitution "does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations." *Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cir. 1992). Indeed, Plakas merely states this theory, he does not argue it. Nor does he show how such a rule of liability could be applied with reasonable limits. We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even a larger number of police officers) and then decide that a municipality is liable because it failed to buy this equipment (or increase its police

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[6] There are a wide variety of devices available for non-lethal control of those who refuse to surrender, including tasers, capture nets, sticky foam, rubber bullets, and beanbag projectiles. *See, e.g.*, John Barry & Tom Morganthau, *Soon, 'Phasers on Stun'*, NEWSWEEK, Feb. 7, 1994, at 24-26. None of these devices is unfailingly effective and safe, and courts and juries are unlikely to be capable of judging when they ought to be used.

force). There can be reasonable debates about whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the Constitution does not enact a police administrator's equipment list.[7] We decline to use this case to impose constitutional equipment requirements on the police.[8]

The district court's grant of summary judgment is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[7] The closest thing we have to such a list is the rule which requires prison administrators to provide a law library to inmates, but even here we only require this as an alternative to providing other forms of legal assistance. And, of course, judges are far more competent to say what equipment is needed to prepare a lawsuit than they are to say what equipment is best to defend one's self against an attack by a man with a poker.

[8] Likewise, we decline to impose a constitutional requirement to train the police to use all available equipment beyond the acceptable training program already mandated. In this record, there is expert opinion that Drinski might have been better trained to negotiate with Plakas and that he may have said one thing to Plakas that he ought not to have said, *i.e.*, that Plakas could hit Drinski with the poker as long as it was not in the head. Plakas, however, merely mentions this testimony to show that Drinski was badly trained. There is no contention that this "invitation" immediately preceded the shooting or caused Plakas to charge Drinski. The only argument in this case is that Plakas did not charge at all.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: March 21, 1994

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable JAMES B. ZAGEL, District Judge*

No. 93-1431

JO ANN PLAKAS, individually and as administrator of the ESTATE OF KONSTANTINO N. PLAKAS, deceased,

Plaintiff-Appellant

v.

JEFFREY DRINSKI, in both his individual and official capacity and NEWTON COUNTY, INDIANA, a municipal unit of government,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division
No. 91 C 365, Rudy Lozano, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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* The Honorable James B. Zagel, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX B

[Filed January 15, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No. H91-365

JO ANN PLAKAS, individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, deceased,

Plaintiffs,

vs.

JEFFREY DRINSKI, in both his individual and official capacity and NEWTON COUNTY, INDIANA, a municipal unit of government,

Defendants.

ORDER

This matter is before the Court on Motion for Summary Judgment, filed August 24, 1992, by Defendant, Jeffrey Drinski ("Drinski"), and Motion for Summary Judgment, filed October 21, 1992, by Defendant, Newton County, Indiana ("Newton County"). For the reasons set forth herein, Drinski's Motion for Summary Judgment is GRANTED, and Newton County's Motion for Summary Judgment is GRANTED.

BACKGROUND

Plaintiff Jo Ann Plakas ("Plaintiff"), individually and as Administratrix of the Estate of Konstantino N. Plakas

("Plakas"), purportedly states claims under 42 U.S.C. § 1983 against Newton County and Drinski, one of its police officers. Drinski's Motion for Summary Judgment argues that as a matter of law, he did not violate the Fourth or Fourteenth Amendment rights of Plaintiff or Plakas and there is no genuine issue of material fact as to the reasonableness of the force Drinski used against Plakas. Alternatively, Drinski argues that he is entitled to qualified immunity. Newton County argues that it is entitled to summary judgment on the ground that there is no constitutional violation. Alternatively, Newton County argues that as a matter of law Drinski was adequately trained in the lawful use of a firearm and in the use of deadly force.

The facts in this case are either undisputed, or are those presented by the Plaintiff, the nonmovant. The facts are derived from the numerous depositions and affidavits in this case.[1]

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[1] In her response to Drinski's Motion for Summary Judgment, Plaintiff argues that the Indiana Dead Man's Statute, Ind. Code Ann. § 34-1-14-6 (West 1983), bars Drinski and fellow officers, Buddy King, David Koby, and other deputies, officers, and employees of Newton County, Indiana from testifying to any statements or occurrences which took place in the presence of the decedent, Plakas.

Rule 601 of the Federal Rules of Evidence provides that, "in all civil actions and proceedings, with respect to element of claim or defense as to which state law applies the rule of decision, the competency of a witness shall be determined in accordance with state law." Fed. R. Evid. 601. Counts One and Two of Plaintiff's Complaint are brought pursuant to 42 U.S.C. § 1983, alleging violation of Plakas' rights under the Fourth and Fourteenth Amendments to the United States Constitution. As both Counts One and Two are wholly founded in federal law, Plaintiff's reliance on the Indiana Dead Man's Statute is completely misplaced and wholly inappropriate. The plain and obvious language of Rule 601 states that "every person is competent to be a witness" except where

(Footnote continued on following page)

On Saturday, February 2, 1991, at about 11 p.m., Plakas was fatally shot by Newton County Deputy Sheriff Jeffrey Drinski. The events which led to this shooting are as follows: Around 9:30 p.m. that night two Newton County Deputy Sheriffs, Corporal David Koby and Sergeant Buddy King, as well as Lake Township Volunteer Fire Department members, Glenn Cain and Stephen Whitt, responded to a call regarding an auto accident on State Road 10. Upon arriving at the scene, the men found Plakas' car in a deep ditch filled with water. The car left the north side of the road and came to rest in the ditch.

Cain found Plakas walking along State Road 10 and stopped to speak with him. Plakas stated that he was the driver of the car found in the ditch, and that he was fine, except that he was cold. Plakas was not injured and was not in need of medical treatment. However, he got in Cain's vehicle and rode west about one mile to the accident scene.

At the scene of the accident, Cain told Officer Koby to check Plakas for intoxication since he could smell alcohol on Plakas' breath and Plakas was dozing off. Plakas signed a waiver of medical treatment after being examined by the Newton County Ambulance Service, and told Koby he would go to the Sheriff's Department for a breatha-

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[1] *continued*
state law supplies the rule of decision, the competency of a witness will be determined in accordance with state law. Fed. R. Evid. 601. As no Indiana law supplies any rule of decision in this matter, the Indiana Dead Man's Statute does not apply, and Drinski, as well as other officers, deputies and employees of Newton County are competent to testify in this matter. *See e.g. Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1051 (7th Cir.), *cert. denied*, 433 U.S. 875 (1977); *Donaldson v. Hovanec*, 473 F. Supp. 602, 610 (E.D. Pa. 1979).

lyzer test. Koby patted down Plakas, then handcuffed him behind his back, and directed him to get into the rear of the squad car to be transported to the county jail for a breathalyzer test. Plakas claimed that being cuffed behind the back would injure his chest, which had extensive scar tissue from a childhood burn. Koby cuffed Plakas behind the back, ignoring his request to be cuffed in front.

As Koby drove towards the jail he heard a noise from the back seat as if one of the car doors had opened. Fearing that Plakas would jump out of the car as it was moving, Koby pulled his squad car off the road and stopped. The back door flew open and Plakas jumped out and started running across a field. Koby radioed that Plakas had escaped from Koby's vehicle two to four miles east of the accident site. The message was heard by Cain and Whitt of the fire department, King and Drinski of the Sheriff's office, and State Trooper Lucien Perras. Cain arrived at the scene and helped Koby search for Plakas in a field north of State Road 10.

Roy and Joyce Ailes lived in a house at the end of a long driveway to the north of State Road 10. Plakas had been dating their daughter, Rachael Ailes, for about four years, and they were engaged to be married. On February 2, 1991, at around 10 p.m., Plakas arrived on the doorstep of the Ailes' home. Joyce Ailes opened the door to let Plakas in and he fell through the front door into her living room. Plakas was handcuffed behind the back. Plakas stated that he'd wrecked his car and that he needed help. Joyce Ailes was under the impression that Plakas had multiple lumps to the head and bruises to his legs. It appeared that he was in need of medical attention and was blacking out because of head injuries.

Roy Ailes entered the living room and spoke to Plakas. Plakas kept stating that he didn't do anything wrong.

From his living room, Mr. Ailes could see the lights from the police cars on State Road 10. He told Plakas that he could not run from the police and he would help straighten things out. Plakas agreed that Roy Ailes should go talk to the police. Ailes drove to where the officers were, and advised Cain that Plakas was at his house and was willing to come out to talk to them. Ailes directed the officers to his home. Koby, Drinski, and Cain then drove to Mr. Ailes' home. Cain approached the front door of the house to see if Plakas needed medical treatment. He observed Plakas in the process of sliding his arms beneath his buttocks and legs in order to bring his handcuffs in front of him. Cain entered through the front door with Koby behind him. Drinski went to watch the back door of the house.

As soon as Cain and Koby entered the house, Plakas began screaming. He was standing in a corner of the Ailes' living room with his hands now cuffed in front of him. Plakas' demeanor went from calm to upset at the sight of the uniformed fireman and police officer. When Koby entered the house the tension escalated and Plakas began shouting, screaming, and swearing that Koby had hurt him and that Koby would not touch him. Plakas then backed into the corner of the living room and as he backed up he bumped the fireplace tools, reached down and picked up the poker. The fireplace poker was two to three feet long with a hook on the end. Plakas gripped it like a baseball bat as he screamed at Cain and Koby. Several minutes after Plakas picked up the poker he rushed at Officer Koby and swung the poker like an axe at Officer Koby's head. Officer Koby threw his left hand up to protect his head and Plakas hit him on the wrist with the poker. Officer Koby fell into the door and ran out of the house. Officer Koby never drew his gun while in the house.

Plakas then chased Cain with the poker. Cain ran up through a stairway two or three stairs into the kitchen to avoid also being hit with the poker. To avoid Plakas, Cain ran through the house and out into the garage. Having heard the scuffle, Drinski came around to the front of the house and around the same time, Sergeant King and Trooper Perras arrived on the scene. Drinski and Perras then entered the house through the garage door with their guns drawn. As they entered, they saw Plakas run out of the front door of the house. Plakas stopped in the yard after running out of the house. The police officers drew their guns and Mr. Ailes jumped between the police officers and Plakas. Ailes tried to get Plakas to put the poker down and surrender. As Ailes talked to Plakas, Plakas slowly backed down a hill in the Ailes' yard. For a moment it seemed that he might put down the poker and surrender. However, as police moved in behind Mr. Ailes, Plakas turned, tripped over a wire fence, and ran to the north through a nearby open field with Officers King and Drinski, as well as State Trooper Perras in pursuit. The police officers continued to yell, "Stop, police." Plakas was still cuffed in front, palm to back of hand, holding the fireplace poker. The officers had no trouble keeping up with Plakas. It was a clear night, the moon was bright, the snow on the ground further illuminated the field, and the officers had no problem seeing Plakas.

As Plakas entered some thick brush, he slowed down. The officers had their guns drawn and their flashlights trained on Plakas. After moving through the brush, Plakas entered a clearing. Drinski and Perras followed Plakas into the clearing, maintaining a distance of at least ten feet from him, while King stayed on the outside of the brush. Plakas crossed the clearing and stopped and faced the officers when he reached the heavy brush on the far east

side. For the next several minutes, the officers kept their distance and tried to convince Plakas to surrender. Plakas attempted to break through the brush behind him and leave the clearing, but the brush was too thick. The officers continued to talk to Plakas, telling him that he should surrender and that he would get himself in more trouble if he didn't. Plakas stated that his life wasn't worth living and that he was going to kill both officers, or they would have to kill him. He carried the poker like a baseball bat in front of him, moving it around some. At all times, Drinski was directly in front of Plakas, and Perras remained five to seven feet to the left of Drinski. The officers continued to talk to Plakas for a few minutes, but were unable to calm him down. Again, Plakas stated that his life wasn't worth living, and that the officers would have to kill him, or he would attempt to kill them both. He then raised the poker like a baseball bat and lunged toward Drinski. Drinski took a step back, and nearly fell down as he fired a single shot which struck Plakas mid-chest. Plakas subsequently died of this wound.

Plakas' mother, the Administratrix of his estate, has filed suit under 42 U.S.C. § 1983 against Drinski and Newton County to recover damages in connection with her son's death. She alleges that her son was armed with only a fireplace poker and posed no serious threat to the safety of Drinski or others. She alleges that Drinski and Newton County violated her son's rights under the Fourth and Fourteenth Amendments, "to be secure in his person, to be free from the use of deadly force, to be free from punishment without due process of law, and to equal protection of the laws." (Plaintiff's Amended Complaint at ¶ 14) She also claims that her own rights to parenthood and association under the Fourteenth Amendment, were infringed. (Plaintiff's Amended Complaint at ¶ 15)

DISCUSSION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper only if it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *First Wis. Trust Co. v. Schroud*, 916 F.2d 394, 398 (7th Cir. 1990). In other words, the record must reveal that no reasonable jury could find for the nonmovant. *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 335 (7th Cir. 1991); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In deciding a motion for summary judgment, the Court must read all facts in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Richardson v. Penfold*, 839 F.2d 392, 394 (7th Cir. 1988).

The burden is upon the moving party to identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," if any, which it believes demonstrates an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met this burden, the nonmoving party may not rest upon mere allegations but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Becker v. Tanenbaum-Hill Assoc., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990); *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 (7th Cir. 1989). "Whether a fact is material depends on the substantive law underlying a particular claim and only disputes over facts that *might effect the outcome* of the suit under governing law will properly preclude the entry of summary judgment.' " *Walter v. Fiorenzo*, 840 F.2d 427, 434 (7th Cir. 1988) (citing *Anderson*, 477 U.S. at 250-252)).

"[A] party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a *genuine* issue of material fact which requires trial." *Beard v. Whitley County REMC*, 840 F.2d 405, 410 (7th Cir. 1988). Therefore, if a party fails to establish the existence of an essential element of its case on which it bears the burden of proof at trial, summary judgment will be appropriate. In this situation, there can be " 'no genuine issue as to any material fact', since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 324 (1986).

Drinski's Motion for Summary Judgment

Drinski first argues that he is entitled to summary judgment because a reasonable jury could reach only one conclusion, based upon the evidence, that a reasonable police officer at the scene would have acted as Drinski did. He contends, therefore, that a trial would be useless.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989), held that claims of excessive force in the course of arrest or other seizure must be analyzed under the Fourth Amendment's "objective reasonableness" standard. The Court looks to "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397; *McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992).

The use of deadly force will be deemed objectively reasonable "where the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S.

1, 11 (1985). "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11-12. The existence of probable cause is a question for the jury only "if there is room for a difference of opinion." *Ford v. Childers*, 855 F.2d 1271, 1275 (7th Cir. 1988). Additionally, it is imperative that in determining the reasonableness of the officer's conduct, the focus is on the very moment when the officer makes the "split second judgments", *Graham v. Connor*, 490 U.S. at 397, which led to the use of deadly force:

> The "reasonableness" of a particular use of force must be judged from the prospective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Id. (citations omitted).

In *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988), two police officers shot a fleeing bankrobber whom they believed might be armed. The Seventh Circuit affirmed the district court's grant of a directed verdict in favor of the defendant police officers, holding that "a reasonable jury could only conclude that Officer Childers had probable cause to believe that Ford posed a threat of serious physical harm to himself and/or to others." 855 F.2d at 1276. Thus, the court held that the officer's actions under the circumstances were objectively reasonable as a matter of law. *Id.* The court reasoned that although the officer,

at the time he shot Ford, did not know that Ford was armed, given the information that he possessed at the time, and the observations that he made, the officer reasonably concluded that Ford was armed and dangerous. *Id.* at 1275. The court stressed that under the Fourth Amendment, the constitutionality of the officer's action was not judged with hindsight, but only by "an examination and weighing of the information [he] possessed immediately prior to and at the very moment he fired the fatal shot." *Id.* (quoting *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988)).

The Seventh Circuit most recently addressed the use of deadly force to effectuate an arrest in *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992). There, five law enforcement officers concocted a scheme for arresting a man suspected of plotting the murder of his wife. Concerned that the suspect was usually heavily armed, especially in his home, the officers decided they would lure the suspect to a highway roadside, where officers pretending to be stranded motorists would effectuate his arrest. The plan went awry, as one of the impatient officers announced that he was a policeman. The suspect immediately shot and killed one of the officers and fired at least four shots at another officer, who was shot and injured. One of the other officers then shot the suspect in the chest with a single twelve-gauge shotgun slug, which killed him. Acting as the administratrix of his estate, his wife sued the officers, charging that their scheme to arrest him had "provoked a situation whereby unreasonable deadly force was used in the attempt to seize his person in violation of the Fourth Amendment . . . ." *Carter v. Buscher*, 763 F. Supp. 392, 394 (C.D. Ill. 1991). The district court granted summary judgment for the defendants, holding that the use of deadly force was reasonable as a matter of law:

> In the case at bar, there is no question that the police seized Ruhl by the use of deadly force. However, there is also no question that, as a matter of law, the seizure was reasonable. As recognized by *Garner*, the police are authorized to use deadly force to apprehend a felon where they have probable cause to believe the felon poses a risk of serious harm to the officers or others. The state police and corrections officers did not use deadly force until Ruhl had killed agent Bensyl and shot agent McLearin three times. Clearly, they had probable cause to believe that their lives were in danger if they did not return Ruhl's fire.

763 F. Supp. at 396.

The Seventh Circuit affirmed the summary judgment entered below, agreeing that the use of deadly force was unquestionably justified. Furthermore, the court rejected the appellant's contention that the Fourth Amendment prohibits creating a foreseeably dangerous situation in which to arrest a suspect. Simply put, the court held that "pre-seizure conduct is not subject to Fourth Amendment scrutiny." 973 F.2d at 1332. "Even if the defendants concocted a dubious scheme to bring about Ruhl's arrest, it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment." *Id.* at 1333.

The undisputed facts in this case are that Plakas was armed with a two to three foot steel rod with a hook on the end of it. He had already assaulted one officer with this weapon. He evaded arrest, fled from the police, and claimed that he would not be taken alive. After speaking to Plakas for almost thirty minutes, Drinski and Perras were unable to calm Plakas or get him to surrender. He claimed that he would kill them both or that they would have to kill him. Finally, Plakas lunged at Drinski

with the fireplace poker in front of him. As a matter of law, there can be no other conclusion but that Plakas threatened Drinski with a weapon intending to inflict serious physical harm. *Garner*, 471 U.S. at 11-12. Under these circumstances, this Court holds that a reasonable jury could only conclude that Drinski had probable cause to believe that Plakas posed a threat of serious physical harm to himself and/or to others. *Ford*, 855 F.2d at 1276. Thus, Drinski's split-second decision to use deadly force to protect himself was objectively reasonable as a matter of law, and under these circumstances there can be no violation of the Fourth or Fourteenth Amendments.

This Court rejects the arguments and intimations made by Plaintiff that Drinski was under a legal obligation to either let Plakas escape, or to effect his arrest by less provocative means. That Trooper Perras had with him a canister of teargas and that a canine unit could have been summoned within thirty minutes, are immaterial to the inquiry of whether the force used to seize Plakas was reasonable. Our jurisprudence does not require this Court to inquire what other means are available to effectuate this seizure. The relevant inquiry is only whether at the time deadly force is used, whether the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others. *Garner*, 471 U.S. at 11-12. As this remains the test employed by federal courts, all other inquiry is immaterial.

Accordingly, this Court hereby GRANTS Drinski's Motion for Summary Judgment, as Drinski's actions under the circumstances were objectively reasonable as a matter of law.

Newton County's Motion for Summary Judgment

Since this Court holds that Drinski acted reasonably under the circumstances, it follows that Newton County, as his employer, cannot be held liable to Plakas, as its liability was dependent upon the unreasonableness of Drinski's actions. Because Drinski did not violate Plakas' constitutional rights, there is no basis for liability against Newton County. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that department regulations might have authorized the use of constitutionally excessive force is beside the point.") *See also Tom v. Voida*, 963 F.2d 952, 962 (7th Cir. 1992); *Ford v. Childers*, 855 F.2d at 1276-1277.

Accordingly, this Court hereby GRANTS Newton County's Motion for Summary Judgment.

ENTER: 1/16/93

/s/ Rudy Lozano
Rudy Lozano, Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JUDGMENT IN A CIVIL CASE

Jo Ann Plakas, Individually and as Administrator of the Estate of Konstantino N. Plakas, Deceased

v. Case Number: H91-365

Jeffrey Drinski, in both his individual and official capacity and Newton County, IN a municipal unit of government

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☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court * * * and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That Drinski's and Newton County's Motion for Summary Judgment is Granted.

Date January 20, 1993

GERALDINE J. CROCKETT
Clerk

/s/ IRMA RIVERA
(By) Deputy Clerk

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

The fourth amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. IV.

The fourteenth amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, sec. 1.

Section 1983 of Title 42 of the United States Code provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction there-

of to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1983 (1991).